SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 23 1969
JOHN F. DAVIS, CLERK

in the Supreme Court of the United States

October Term, [redacted] 1968

No. 1301

ARTHUR I. SNYDER,

Petitioner,

vs.

JOURNAL PUBLISHING COMPANY,
A FLORIDA CORPORATION,
W. H. HARWELL, JR. and
BILL ROBERTSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL IN AND FOR THE THIRD DISTRICT, FLORIDA

BURTON YOUNG
Attorney for Petitioner

1799 N.E. 164th Street
North Miami Beach, Florida

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
Opinion	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	4
Statement of Case and of the Facts	6
Reasons for Granting Writ	8
I. The District Court of Appeal Has Decided The Case By Using Non-Federal Grounds Which Are Without Fair Support, Which Should Not Be Allowed To Defeat Jurisdiction Of This Court	8-11
II. The District Court of Appeal Erroneously Decided An Important Question of Constitutional Law In A Manner Which Conflicts With Applicable Decisions Of This Court Relative To The Freedom Of The Press And Has Also Decided An Important Question Of Constitutional Law Which Has Not Been Settled, i.e. The Application of the New York Times Doctrine To The Situation Where A Public Official Is Branded A Religious Bigot Because He Protected Freedom of Speech	12-16
Conclusion	17

CITATIONS AND AUTHORITIES

Case	Page
Adams v. News Journal Corporation, 84 So.2d 549 (1955)	7, 9, 10
Beckley Newspaper Corporation v. C. Harold Hanks, 389 U.S. 81 (1967)	7
Bridges v. California, 314 U.S. 252 (1942)	14
Garrison v. Louisiana, 379 U.S. 64 (1964)	7, 13
Hawkins v. State, 204 So.2d 545 (Fla. 3rd Dist. 1967)	9
Hevey v. News-Journal Corporation, 148 So.2d 543 (Fla. 1st Dist. 1963)	8, 9
Loeb v. Geronemus, 66 So.2d 241, 245 (Fla. 1953)	8, 9
Miami Herald Publishing Co. v. Brautigam, 127 So.2d 718 (Fla. 3rd Dist. 1961)	8, 10
Near v. Minnesota, 283 U.S. 697 (1931)	12
New York Times v. Sullivan, 376 U.S. 254 (1964)	2, 3, 7, 11, 12, 13, 17
O'Neal v. Tribune Company, 176 So.2d 548, 549 (Fla. 2d Dist. 1965)	9
Pennekamp v. Florida, 328 U.S. 331 (1946)	14
Rosenblatt v. Baer, 383 U.S. 75 (1966)	13
Schenck v. United States, 249 U.S. 47 (1919)	13
Terminiello v. City of Chicago, 337 U.S. 4, 5, (1949)	15, 16
Wolfe v. State of North Carolina, 364 U.S. 177, *rehear. den.* 364 U.S. 856 (1960)	11
Wood v. Georgia, 370 U.S. 375 (1962)	14

STATUTES AND CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment 1 4

Amendment 5 4

Amendment 14 5

28 U.S.C. § 1257(3) 5

In the Supreme Court of the United States

October Term, 1969

No. _____

ARTHUR I. SNYDER,

Petitioner,

vs.

JOURNAL PUBLISHING COMPANY,
A FLORIDA CORPORATION,
W. H. HARWELL, JR. and
BILL ROBERTSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL IN AND FOR THE THIRD DISTRICT, FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Florida District Court of Appeal, in and for the Third District, entered in the above case on September 10, 1968 and regarding which Petition for Writ of Certiorari submitted to the Florida Supreme Court was denied for lack of jurisdiction on January 30, 1969.

OPINIONS BELOW

The opinion of the Third District Court of Appeal of Florida and Florida Supreme Court are as yet unreported. Such opinions are appended hereto (Appendix p. 20).

JURISDICTION

The Petition for Rehearing to the District Court of Appeal was denied on October 8, 1969, and Petition for Writ of Certiorari was denied by the Florida Supreme Court on January 30, 1969, for lack of jurisdiction. The jurisdiction of this Court is involved under 28 U.S.C. 1257 (3) and the First, Fifth and Fourteenth Amendments to the United States Constitution.

The matter is of great public interest because there is involved the question of whether the doctrine of *New York Times v. Sullivan*, 376 U.S. 254 (1964) is limited so that the press cannot with impunity publish false and libelous articles which tend to restrict freedom of speech amongst elected city councilmen engaged in hot debate.

QUESTIONS PRESENTED

1. Whether a State court can avoid deciding a federal question and thereby defeat jurisdiction of the United States Supreme Court by putting forward non-federal grounds of decision which are without fair support?

2. Whether the First Amendment to the United States Constitution as defined in *New York Times v. Sullivan*, extends so far, that the mayor of a city is precluded from a jury trial of the issues in a suit for libel which complains that the press knowingly, falsely and maliciously published a report accusing him of religious bigotry during council meetings?

(a) Whether the Constitutional protections of freedom of speech, as defined in *New York Times* allow a trial court to dismiss without trial a fact issue that the press, with actual malice, knowingly and falsely accused a public official of tolerating religious bigotry in his capacity as mayor?

3. Whether the press is thus rendered immune to a jury trial on the fact of actual malice when it publishes a false article accusing the mayor of a city, of religious bigotry because he extended the guaranty of freedom of speech, during hot debate, to elected councilmen?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 1 to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 5 to the Constitution of the United States provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 14 to the Constitution of the United States, provides:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1257 (3) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of Certiorari when the validity of a treaty or statute of the United States is drawn in question or where the validity of a State's statute is drawn in question or the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

STATEMENT OF THE CASE

This case involves the right of the mayor of a city, who is also a practicing attorney, to a jury trial when there is at issue actual malice and falsity in a newspaper article accusing him of tolerating religious bigotry amongst his councilmen because he did not restrict their right to freedom of speech during spirited debate.

Petitioner at the time of the alleged libel was mayor of the City of North Miami Beach, Florida and an attorney at law practicing his profession in that city. He alleged in his Complaint (R. 2, T. 1-5) and Amended Complaint (R. 2, T. 2, 3, 14-17, 20) filed in the Circuit Court of the Eleventh Judicial Circuit In and For Dade County, Florida, that respondent published an article which accused petitioner of condoning religious bigotry within the City Council meetings over which he presided (R. 2; T. 14-17). The Complaint as amended alleged that respondent had falsely, knowingly, with knowledge of the falsity, and maliciously (R. 2, T. 2, 3, 14-17, 20) published the article. Respondent filed motion to dismiss the original complaint, for failure to state a cause of action (R. 2, T. 6) stating, inter alia, that the complaint failed to allege actual malice and further that the matters complained of did not constitute libel per se. The trial court denied the motion (R. 2, T. 7) and respondents then answered (R. 2, T. 8-10), admitting the publication, and further alleging privilege under the First and Fourteenth Amendments to the United States Constitution (R. 2, T. 9), guaranty of freedom of speech and of the press, and privilege under the Fifth and Fourteenth Amendments due process clause (R. 2, T. 10). They further defended that their article referred to the official actions of a public official and that it was published without malice and therefore unactionable under the protection afforded by the First and Fourteenth Amendments (R. 2, T. 10). At the pre-trial conference, peti-

tioner emphasized the United States Constitutional issues involved when he amended his Complaint, by calling the court's attention to *Beckley Newspaper Corporation v. C. Harold Hanks*, 339 U.S. 81 (1967), which dealt with *New York Times v. Sullivan*, (R. 2, T. 20). Petitioner stated that his motive was to abate any possible future problems in meeting the *Sullivan* test (R. 2, T. 20). Respondents at that time, were allowed to insert an additional federal constitutional defense, which they declared was espoused in *Garrison v. Louisiana*, 379 U.S. 64 (1964) (R. 2, T. 21-22). Respondent later made a Motion for Summary Judgment and the court entered its order (R. 2, T. 25), not for summary judgment, but for failure to state a cause of action, which was the original ground in respondent's motion to dismiss. The Court stated that it had considered *New York Times* and other Supreme Court decisions and that on motion for summary judgment involved whether a genuine issue of fact as to actual malice existed (R. 2, T. 25). The Court decided it was unnecessary to rule on that issue of fact since it was dismissing with prejudice because the article failed to come within the Florida definition of libel per se (R. 2, T. 26).

Petitioner appealed to the District Court of Appeal, Third District, which affirmed the trial court per curiam (R. 2, T. 30). No opinion was rendered by the appellate court beyond, "see *Adams v. News-Journal Corporation*, 84 So.2d 549 (Fla. 1955) and cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct., 710 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964)" App. p. 20). Petitioner applied for rehearing (R. 31), which was denied (R. 2, T. 33), alleging that the appellate court had overlooked the allegation of actual malice, which would, under the *Sullivan* doctrine, vitiate any protection of free speech. Petitioner then sought a Writ of Certiorari in the Supreme Court of Florida (R. 1). The Supreme Court of Florida denied the writ, stating that it lacked jurisdiction (R. 4).

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT OF APPEAL HAS DECIDED THE CASE BY RAISING NON-FEDERAL GROUNDS WHICH ARE WITHOUT FAIR SUPPORT, WHICH SHOULD NOT BE ALLOWED TO DEFEAT JURISDICTION OF THIS COURT.

The trial court considered the United States constitutional issues at the pre-trial conference and then decided to dismiss the suit because in its opinion the article was not libelous per se. A study of case law in Florida reveals that a publication is libelous per se if, inter alia, it imputes to another, conduct, characteristics or a condition incompatible with the proper exercise of his lawful business, trade, profession or office. *Miami Herald Publishing Co. v. Brautigam*, 127 So.2d 718 (Fla. 3rd Dist. 1961), *cert. den.* Supreme Court of Florida, 135 So.2d 741, *cert. den.*, United States Supreme Court, 369 U.S. 821. The Florida Supreme Court has held that in determining the basic question of whether language is defamatory the words used are to be construed in that sense in which they must be understood, in which the common mind would understand them. *Loeb v. Geronemus*, 66 So.2d 241, 245 (Fla. 1953). In *Hevey v. News-Journal Corporation*, 148 So.2d 543 (Fla. 1st Dist. 1963), a suit by a city commissioner against a newspaper, the court stated that several paragraphs in an article did not independently or collectively equal libel per se in their particulars, but that con-

struing the editorial as a whole, it was actionable per se in that by clear innuendo and inference it charged the plaintiff with misconduct in office. In *Hevey*, the trial court had, as in the case at bar, dismissed the action with prejudice. But the First District Court of Appeal of Florida reversed and remanded. In the Third District Court of Appeal of Florida, whence comes the present case, that court followed *Hevey* in *Hawkins v. State*, 204 So.2d 545 (Fla. 3rd Dist. 1967). In *O'Neal v. Tribune Company*, 171 So.2d 548, 549 (Fla. 2d Dist. 1965), the court, in holding that a newspaper article had no qualified privilege because it did not conform to the requirements of fairness and accuracy, stated: "There is a great difference in saying that someone has been beaten and imputing a charge that someone has done the beating."

The ruling of the trial court below was affirmed by the appellate court on the basis of *Adams v. News-Journal Corporation*. In *Adams*, an attorney sued a newspaper for publishing an article accusing the attorney of falsely and irresponsibly accusing policemen of brutality. The Florida Supreme Court on the issue of libel per se, stated that such statements are of that character when, considered alone without innuendo, they contain charges that a person has committed an infamous crime, contracted an infectious disease, carry statements tending to subject a person to hatred, distrust, ridicule, contempt, or disgrace, or to injure a person in his trade or profession. But the Florida Supreme Court in *Adams* stated that the judgment in each case must depend upon the facts peculiar to that case. That court further interpreted the article under its scrutiny under the "common mind" doctrine set out in *Loeb*. *Adams* is distinguishable from the case at bar, in that in *Adams*, the Florida Supreme Court analyzed each

paragraph and concluded that the article only criticized a system. Furthermore, no demand for retraction had been made upon the newspaper, whereas petitioner demanded and the newspaper refused to retract. The instant case is more readily analogyzed to *Brautigam*, which came some six years after *Adams*, and which also went to the Supreme Court of Florida, which transferred it back to the Third District Court of Appeal of Florida, stating that inherent in the judgment was construction of controlling provisions of the Florida and Federal Constitutions, and that a libel action which was indistinguishable from other libel suits and which was not one in which the Court did in fact construe a controlling provision in either Constitution was one over which the Supreme Court of Florida did not have jurisdiction on direct appeal. In *Brautigam* the Third District Court of Appeal of Florida had transferred the cause to the Florida Supreme Court on the ground that inherent in the judgment there was the construction of controlling provisions of the Florida and Federal Constitutions guaranteeing freedom of the press. In *Brautigam*, the plaintiff was a State's Attorney who won a suit which was similar in many respects to the instant case: The libel was directed at a public official for allegedly not acting responsibly toward the grand jury. The trial court let the issue go to the jury. The Third District Court of Appeal affirmed the judgment in favor of the public official by holding that freedom of speech and press do not carry with them freedom from responsibility in the misuse of those rights. The court then outlined the elements of libel per se (enumerated in *Adams*) and further stated that the article fell within the definition. The article libelling petitioner is similar to the article which libelled Brautigam and specifically underwent the scrutiny of the same appellate court which decided for Brautigam (App. p. 22).

The appellate court in the instant case stated that *New York Times* followed the *Adams* decision (App. p. 20). It is obvious that *New York Times* interpreted the United States Constitution and set out a federal guideline which requires proof of actual malice as a prerequisite to a libel suit against a newspaper by a public official. Thus, *Adams* and *New York Times* are not related in their concepts.

A State court may not avoid deciding federal questions by putting forward non-federal grounds of decision which are without any fair or substantial support. *Wolfe v. State of North Carolina*, 364 U.S. 177, rehearing den. 364 U.S. 856 (1960). The instant case was not properly decided under state law; the federal guideline set forth in the decision of the Court in *New York Times* and subsequent cases should have controlled. The appellate court while delivering an ambiguous decision, seemed to consider the *New York Times* decision as controlling, but did not remand to the trial court to correct its decision to conform to the *New York Times* doctrine.

II.

THE DISTRICT COURT OF APPEAL ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A MANNER WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT RELATIVE TO THE FREEDOM OF THE PRESS AND HAS ALSO DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN SETTLED, i.e. THE APPLICATION OF THE NEW YORK TIMES DOCTRINE TO THE SITUATION WHERE A PUBLIC OFFICIAL WHO IS ALSO A PRACTICING ATTORNEY IS BRANDED A RELIGIOUS BIGOT BECAUSE HE PROTECTED FREEDOM OF SPEECH.

The trial court erroneously decided that *New York Times* did not apply even though the public official who was also an attorney, alleged malice in his complaint as amended. The District Court of Appeal of Florida correctly decided that *New York Times* did apply but it misconceived the doctrine.

It is recognized that punishment for the abuse of the liberty accorded the press is essential to protect the public but that the common law rules subjecting one who libels to responsibility for the public and private offense are not abolished by our *Constitution, Near v. Minnesota*, 283 U. S. 697 (1931). The facts are, as shown in the defamatory article, that the libel occurred during pre-election campaigns in a community which is sensitive to religious bigotry. It has long been recognized by this Court that

limitations are placed on freedoms of expression during exceptional periods; *Schenck v. United States*, 249 U. S. 47 (1919). In *New York Times v. Sullivan*, and *Garrison v. Louisiana*, 379 U. S. 74C (1964), this court held that under the First and Fourteenth Amendments, a state court cannot award damages to a public official for a defamatory falsehold relating to his official conduct unless the official proves actual malice and that the falsehood be published with knowledge of its falsity or with reckless disregard whether it was true or false.

In the instant case, petitioner, in his compliant, as amended, made these allegations and thus came to issue with respondent, but the appellate court affirmed the trial court's dismissal on the basis of *New York Times*, without petitioner's being given an opportunity to prove his allegations. It is submitted that denial of the right to prove actual malice is a deprivation of procedural due process under the Fourteenth Amendment, since state law allows fact issues to be tried by jury, and it is unfair that petitioner be denied this right in contravention of usual court practices. If a statement at issue is an explicit charge of corruption, this Court assumed in *Rosenblatt v. Baer*, 383 U. S. 75 (1966), without deciding, that a public official might recover. Here, respondents' article explicitly stated that petitioner allowed bigotry to prevail at city council meetings, and that he was the only man who could have prevented such conduct. In *Rosenblatt*, Mr. Justice Brennan, stated: "Moreover, even if the claim falls within *New York Times*, the record suggests respondent may be able to present a jury question of malice as there defined." In the same case, Mr. Justice Douglas, in his concurring opinion, stated: ". . . The question in final analysis is the extent to which the Due Process Clause of the Fourteenth

Amendment has displaced the libel laws of the States . . . Some think that due process as applied to the State is a watered-down federal version as respects the guarantees in the Bill of Rights that are incorporated into the Fourteenth Amendment. . . . That has been the minority view . . . [T]he question is whether a public *issue*, not a public official is involved." The facts show that both a public official and a public issue are involved, when a publication accuses the official of bigotry. Furthermore, the attack here was a personal attack directed at a practicing attorney, endangering his right to earn a living.

Although this Court has never directly decided whether freedom of press extends to the point where a public official can be libeled by the press with impunity, as one who tolerates religious bigotry, because he himself has extended constitutional freedom of speech protections to legislators or others, its past decisions indicate that *New York Times* will not extend freedom of the press to that degree. In several cases, this Court held that the First and Fourteenth Amendment protection of freedom of press will be extended except in those instances when there is a clear and present danger of interference with the orderly administration of justice. *Bridges v. California*, 314 U. S. 252 (1942); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Wood v. Georgia*, 370 U. S. 375 (1962). Thus it is reasonable to assume that the federal guideline is the "clear and present danger" test when determining whether the press is immune from libel. Mr. Justice Henry Billings Brown stated that in a democratic country it is especially desirable that public life should be made attractive to men of education, good family, and refined instinct; but if their entrance to it is greeted by storms of abuse, vituperation and unjust aspersions on their character, it ought to be

no matter of surprise if they abandon the field to men of coarser fiber. Vol. II p. 127 *The Brief*, Phi Delta Phi (1899). Thus, under certain circumstances, there is a clear and present danger to the proper administration of small cities of our country when the press is allowed unbridled, false and malicious attacks upon public officials whose means of earning a living are from outside sources, rather than from the public payroll, and who serve as officials from a sense of civic duty.

In *Terminiello v. City of Chicago*, 337 U. S. 4, 5 (1949), Mr. Justice Douglas, in the majority opinion stated,

> ". . . [A] function of freedom of speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a substantial evil that rises far above public inconvenience, annoyance or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

The instant case fits within the rule of *Terminiello:* Not only is there the clear and present danger of preventing upright citizens from seeking office in small communities, because of malicious and false libel, but there is also the clear and present danger that our legislators will be restricted in their freedom of speech by persons such as petitioner, who otherwise recognize its value as outlined in *Terminello;* and further, there is a present danger of the substantial evil of the press, especially in our small communities, of censoring the very speech sought to be protected, and imposition of private ideas and ideologies by the press on those who are elected to govern, under the threat of using its freedom of press protection as a sword and not a shield.

CONCLUSION

The State court has decided federal questions which conflict with decisions of this Court. Furthermore, if a presiding public official who is also a practicing attorney is obligated to protect freedom of speech of legislators and if *New York Times*, protects freedom of speech of the press, there must be a point at which one facet of First Amendment protection of free speech must yield to yet another facet of that same Amendment. That yield point is determined by a proper application of the limitations expressed in *New York Times*, and recognition of a clear and present danger such as is evidenced by this case. Petitioner is entitled to a jury trial on the fact questions of whether there is a personal issue and whether actual malice is involved.

WHEREFORE, for the foregoing reasons, petitioner prays that this Court grant a writ of certiorari to review the decision of the Florida District Court of Appeal for the Third District.

Respectfully submitted,

BURTON YOUNG
Attorney for Petitioner

1799 N.E. 164th St.
North Miami Beach, Florida

INDEX TO APPENDIX

	Page
Opinion of Supreme Court of Florida	20
Opinion of District Court of Appeal In And For The Third District, Florida	21
Newspaper article held to be libel per se, as reproduced in the opinion *Miami Herald v. Brautigam*, 127 So.2d 720, 721 (1961)	22-25

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

CASE NO. 68-146

JULY TERM, A.D. 1968

ARTHUR I. SNYDER,

Appellant,

vs.

JOURNAL PUBLISHING COMPANY,
a Florida corporation,
W. H. HARWELL, JR. and
BILL ROBERTSON,

Appellees.

Opinion filed September 10, 1968.

An appeal from the Circuit Court for Dade County, Thomas E. Lee, Jr., Judge.

Snyder, Young & Stern, for appellant.

Scott, McCarthy, Steel, Hector & Davis and Dwight Sullivan, for appellees.

Before PEARSON, HENDRY and SWANN, JJ.

PER CURIAM.

Affirmed. See Adams v. News-Journal Corporation, Fla. 1955, 84 So.2d 549; cf. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 686, 95 A.L.R.2d 1412 (1946).

(TITLE OMITTED)

CASE NO. 37,937

DISTRICT COURT OF APPEAL,

THIRD DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

TEST:

SID J. WHITE
Clerk Supreme Court.

CC: Hon. W. P. Carter
Hon. E. B. Leatherman
Messrs. Snyder, Young & Stern
Messrs. Scott, McCarthy, Steel, Hector & Davis

MIAMI HERALD PUBLISHING CO.,
a Florida corporation,

Appellant,

vs.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased,

Appellee

NO. 58-409

District Court of Appeal of Florida

Third District

March 9, 1961

Rehearing Denied March 23, 1961

* * * * * * * *

"People Have the Right to Know

"Why Does State Attorney Muzzle The Grand Jury?

"The Action of George A. Brautigam, state attorney, in throwing a road block in front of a hard-working, conscientious Grand Jury, raises two immediate questions:

" 'Is he afraid of something, or of someone?'

" 'Is he trying to protect someone?'

"Neither may be the reason, but the State Attorney has invited both questions.

"The Grand Jury is the people's agency of investigation.

"It supplements the work of the State Attorney, who is the people's prosecutor in important cases.

"His office, however, is not above the Grand Jury's attention.

"When the State Attorney and the Grand Jury are in conflict, as in this instance, the people's rights are in jeopardy.

"In asking Judges [sic] Robert L. Floyd of Circuit Court to withhold the jury's report, Brautigam is off the track of his public responsibility. We think the judge should have told him so instead of granting his request.

* * *

"As Long as Brautigam stands in the untenable position of asking the court to keep the jury's findings from the people he invites suspicion.

"He can remove it only be reversing his course; By making available to the people, who have the right to know, what the Grand Jury has uncovered.

"As it stands, Brautigam, the man the people elected to represent them, has run out on them.

"Who will speak for the people in Judge Floyd's court Monday?"

"Who Will Represent the Public?

"State Attorney Brautigam Runs Out On The People

"This Afternoon at 2 o'clock, the people's right to know what its own agency, the Grand Jury, is doing will be tested before Judge Robert L. Floyd in Circuit Court.

"Who will represent the people in this outlandish situation in which they have been blocked by court order from being told what their Grand Jury wants to tell them in the interest of law and order.

"State Attorney George Brautigam was permitted by Judge Floyd to withhold release of the jury's report until Brautigam had a chance to review the contents. It was highly unusual, if not unprecedented procedure.

"Brautigam is the people's lawyer through the office that he holds.

* * *

"Judge Floyd should take full cognizance of the fact that in seeking even a temporary suppression of the jury's report, Brautigam was not the servant of the people. He ran out on them.

"Judge Floyd should see to it that the people are ably and immediately represented if he feels that his judicial position prevents him from assuring the people in their right to know.

"The Dade County Grand Jury Association should get in touch with Gov. LeRoy Collins, point out that Brautigam turned his back on the people who employ him

as well as on his job when he got the court to hold release of the jury's report, and demand his replacement.

"The people of this county will watch with concern and long memories how their rights are safe-guarded by interested officialdom this afternoon."

"*People Have the Right to Know*

* * * * * * * * 127 So.2d 720, 721 (1961)

SUPREME COURT, U. S.

MAY 14 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1968

No. 1301

ARTHUR I. SNYDER,
Petitioner,

vs.

JOURNAL PUBLISHING COMPANY, a Florida Corporation, W. H. HARWELL, JR., and BILL ROBERTSON,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM C. STEEL
SCOTT MCCARTHY STEEL HECTOR & DAVIS
14th Floor First National Bank Bldg.
Miami, Florida 33131
Counsel for Respondents

E. L. MERRIHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Subject Index

Opinion Below 1

Questions Presented 2

Statement of the Case 2

Argument 6

Introduction 6-7

Point One—Whether Or Not The Complaint As Amended Stated A Cause Of Action For Libel Per Se In The Light Of Applicable State And Federal Decisions 7-13

Point Two—Whether Or Not The Lower Court Could Have Disposed Of The Case By Granting A Summary Judgment 14-17

Conclusion 17

Table of Authorities

CASES

Adams v. *News-Journal Corporation*, Fla. 1955, 84 So. 2d 549 ..... 3, 11, 12

Associated Press v. *Walker*, 1967, 388 U.S. 130 9

Cosgrove Studio and Camera Shop, Inc. v. *Pane*, 1962, 408 Pa. 314, 182 A. 2d 751, 754 8

Garrison v. *Louisiana*, 1964, 379 U.S. 64, 76-77 ..... 13, 17

Gilberg v. *Goffi*, N.Y. 1964, 21 A.D. 2d 517, 251 N.Y.S. 2d 823 13

Hevey v. *News-Journal Corporation*, Fla. App. 1963, 148 So. 2d 543, 553 8

Loeb v. *Geronemus*, Fla. 1953, 66 So. 2d 241 7

New York Times Co. v. *Sullivan*, 1964, 376 U.S. 254 ..... 3, 6, 10, 11, 12, 13, 17

Penry v. *Dozier*, 1909, 161 Ala. 292, 49 So. 909, 913 8

Ross v. *Gore*, Fla. 1950, 48 So. 2d 412, 416 8

Shiell v. *Metropolis Co.*, 1931, 102 Fla. 794, 136 So. 537, 541 9

St. Amant v. *Thompson*, 1968, 390 U.S. 727 17

Sweeney v. *Beacon Journal Co.*, Ohio App. 1941, 35 N.E. 2d 471, appeal dismissed, Ohio, 1941, 34 N.E. 2d 764 9

Sweeney v. *Caller-Times Pub. Co.*, S.D. Texas 1941, 41 F. Supp. 163 9

Sweeney v. *Capital News Co.*, S.D. Idaho, 1941, 37 F. Supp. 355 9

Sweeney v. *Newspaper Printing Corp.*, Tenn. 1941, 147 S.W. 2d 406 9

Sweeney v. *Patterson*, D.C. Cir. 1942, 128 F. 2d 457, certiorari denied 317 U.S. 678 ..... 6, 10, 11

Sweeney v. *Philadelphia Record Co.*, 3d Cir. 1941, 126 F. 2d 53 ..... 9, 13

Sweeney v. *Schenectady Union Pub. Co.*, 2d Cir. 1941, 122 F. 2d 288, affirmed 316 U.S. 642 ..... 9, 10, 13

White v. *Fletcher*, 1956, 90 So. 2d 129 11

Wisner v. *Nichols*, 1913, 165 Iowa 15, 143 N.W. 1020, 1024 8-9

OTHER

33 American Jurisprudence, 220, 221, *Libel and Slander*, §162(b) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1301

ARTHUR I. SNYDER,
Petitioner,

vs.

JOURNAL PUBLISHING COMPANY, a Florida Corporation, W. H. HARWELL, JR., and BILL ROBERTSON,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported in 214 So. 2d 90.

QUESTIONS PRESENTED

We prefer to restate the questions presented as follows:

1. Whether Or Not The Complaint As Amended Stated A Cause Of Action For Libel Per Se In The Light Of Applicable State And Federal Decisions.

2. Whether Or Not The Lower Court Could Have Disposed Of The Case By Granting A Summary Judgment.

STATEMENT OF THE CASE

Petitioner sued respondents for alleged libel arising out of an article published in the North Dade (Florida) Journal on April 12, 1967 (R. 1-8). Respondents moved to dismiss (R. 9), the court denied the motion, respondents answered (R. 10-13), and the parties utilized the various pre-trial discovery procedures provided for by the Florida Rules of Civil Procedure.

Respondents moved for summary judgment (R. 48) and set the motion for hearing at the pre-trial conference. Before the motion was heard, petitioner moved to amend his Complaint (R. 40-43).

At the pre-trial conference, the trial court granted petitioner's motion to amend (R. 52) and continued the scheduled hearing on the motion for summary judgment (R. 79). Respondents then filed a Motion to Dismiss (R. 82-83), and, prior to the scheduled trial date, the trial court heard argument on this motion and the motion for summary judgment and reserved decision on both.

Thus, the court had under advisement at the same time the Motion for Summary Judgment which was based

upon the earlier pleadings and depositions and exhibits in the court file and the Motion to Dismiss directed to the Complaint as amended.

By Order dated February 8, 1968, the trial court granted the Motion to Dismiss. The court said the article petitioner complained of was not libelous per se and that the court was not bound by innuendoes in the pleadings alleging a libel per se when an examination of the article itself showed it was not.

The court further said that the dismissal was with prejudice because petitioner had admitted (in his deposition which the court had considered during the earlier argument on respondents' Motion for Summary Judgment) that he had sustained no special damages and, therefore, could not amend to state a cause of action for libel per quod (R. 510-511).[1]

Petitioner appealed to the District Court of Appeal of Florida, Third District, which on September 10, 1968, affirmed on the authority of *Adams* v. *News-Journal Corporation*, Fla., 1955, 84 So. 2d 549, and *New York Times Co.* v. *Sullivan*, 1964, 376 U.S. 254.

The District Court of Appeal denied rehearing and on January 30, 1969, the Supreme Court of Florida thereafter denied certiorari, stating it was "without jurisdiction."

The Complaint As Amended

In the Complaint as amended, petitioner set out an article that had appeared in the April 12, 1967 issue of the North Dade Journal which stated:

1. Petitioner makes no claim he did sustain any special damages, and for that reason, we are not discussing that point here.

"ONE MAN COULD HAVE STOPPED IT . . ."

"THE TENSION was there and it was so thick you could cut it with a knife.

"And then the statement, the repulsive statement, and the charges, the weeping—and finally the control.

"North Miami Beach City Council candidate Jack Becker was saying that Councilman and Mayor candidate Bill McDonald was anti-semitic, against Jews.

"You could accuse Bill McDonald of a lot of things. You could say that he has trouble getting his point across. You could say that council meetings drag on and on because he argues continually with his chief antagonist, Mayor Arthur Snyder.

"But you cannot say Bill McDonald is anti-semitic. It is neither in the nature of the man, nor in the nature of politics in North Miami Beach.

"Politically it would be suicide because of the heavy Jewish population. Practically, it could not be because McDonald has Jewish running mates. Emotionally it could not be because he wouldn't want the mark it would leave on the spirit.

"THE ACCUSATION against McDonald was more than simply an isolated charge. It was symptomatic of the type of politics that has scavenged the town for too many years.

"McDonald showed remarkable control when he calmly answered after watching his wife flee the room in tears because she, too, was named.

"A lot of the audience obviously had a bellyful, because McDonald drew resounding applause when he defended himself. And he drew it from people in opposite political camps, who only minutes before had snickered at him.

"THERE WAS A MAN who could have stopped it. His name is Arthur Irving Snyder, and he is the mayor of North Miami Beach. He holds the gavel at meetings and controls the talk.

"Only a few weeks ago he made a grand speech about keeping politics out of council meetings. Not only did he not keep them out last week, but he let bigotry and intolerance in.

"And then he asked a reporter not to write about it.

"My wife says there is an intangible form of justice that seeks men out. They can scoff at things dear for only so long, and one day they come face to face with this very personal brand of justice.

"North Miami Beach needs more people who believe it."

He alleged that the particular words in the article which libeled him were:

"ONE MAN COULD HAVE STOPPED IT . . ." (Meaning the Plaintiff).

"THERE WAS A MAN WHO could have stopped it. His name is Arthur Irving Snyder, and he is the mayor of North Miami Beach. * * *"

"Only a few weeks ago he made a grand speech about keeping politics out of council meetings. Not only did he not keep them out last week, but he let bigotry and intolerance in."

(R. 40-42).

In his Complaint as amended, he contended these words accused him of

a) Being a religious bigot;

b) deliberately and for bad motives allowing a governmental meeting to become infected with religious bigotry;

c) misconduct in office; and

d) making a forum available to allow another to accuse a public officeholder of religious bigotry;

and that as a result, he had been injured in his office as Mayor of North Miami Beach and in his profession as an attorney (R. 42).

In his petition, he contends the article falsely accused him "of tolerating religious bigotry amongst his councilmen because he did not restrict their freedom of speech during debate." (Pet. 6)

ARGUMENT

Introduction

Petitioner argues that his Complaint as amended states a cause of action because he alleged that the article he complained of accused him of bigotry or tolerating bigotry and was published with actual malice. He virtually ignores the article itself, apparently on the theory that his conclusions as to what the article says are binding on the court without reference to the article itself.

We submit that the test is what the article says and not what the petitioner says it says. Applying that test, the article did not accuse petitioner of bigotry or of tolerating it.

Even if it did, it was not libelous per se on the authority of *Sweeney* v. *Patterson*, D.C. Cir. 1942, 128 F. 2d 457, certiorari denied 317 U. S. 678, and related cases, because it conceded that petitioner was a public official and that the constitutional privilege of *New York Times Co.* v. *Sullivan,* supra, applies (Pet. 7, 11, 12).

Further, on the record here, the lower court could have reached the same result it did—dismissal of the case —by granting the Motion for Summary Judgment because there was no showing of actual malice.

POINT ONE

WHETHER OR NOT THE COMPLAINT AS AMENDED STATED A CAUSE OF ACTION FOR LIBEL PER SE IN THE LIGHT OF APPLICABLE STATE AND FEDERAL DECISIONS

Article Not Libelous Per Se

Using the "as-the-common-mind-would-understand-it" rule of interpretation of *Loeb* v. *Geronemus,* Fla., 1953, 66 So. 2d 241 (Pet. 9), we submit that a fair interpretation of the article insofar as it applies to petitioner is this:

Petitioner, the mayor of North Miami Beach and presiding officer at city council meetings, failed to exercise proper control of a council meeting. Despite his prior statements about keeping politics out of council meetings, petitioner failed to stop a candidate for office when he began making political comments. This resulted in Becker's accusation that McDonald, a councilman and candidate for office, was anti-Semitic.

The lower court interpreted the article the same way.

The Order of February 8, 1968, stated:

> "I further find that the article complained of concerned a public official, (the Plaintiff-Mayor) and the manner in which he presided over the meeting of his council and that the article represented the opinion of the author and constitutes privileged criticism or fair comment."
>
> (R. 511).

In doing so, the court's approach was in accord with that of the appellate courts in Florida that a court is not bound by conclusory allegations in pleadings in determining the meanings of words and whether they are libelous per se.

In *Ross* v. *Gore,* Fla., 1950, 48 So. 2d 412, 416, the court said:

> "When the statement alleged to be libelous could not properly leave the impression charged in the innuendo, there is no issue for the jury."
>
> 48 So. 2d p. 416.

In *Hevey* v. *News-Journal Corporation,* Fla. App., 1963, 148 So. 2d 543, 553, the court said:

> ". . . In our opinion the hereinabove quoted subparagraphs (a), (b) and (c) of Paragraph III of the complaint, when tested in the light of the editorial to which they refer, do not independently or collectively have the connotation attributed to them, that is to say, the editorial is not libelous per se in those particulars. . . .
>
> "Construing the editorial as a whole, however, we conclude that it is actionable per se in the particulars specified by quoted subparagraph (d) of Paragraph III in that by clear innuendo and inference it charges that the plaintiff is cheating the taxpayers by hiring incompetents for city jobs. . . ."
>
> 148 So. 2d p. 553.

It is well established and has long been the law that the innuendo in a libel complaint cannot be used to change or enlarge the meaning of words. *Cosgrove Studio and Camera Shop, Inc.* v. *Pane,* 1962, 408 Pa. 314, 182 A. 2d 751, 754; *Penry* v. *Dozier,* 1909, 161 Ala. 292, 49 So. 909, 913; *Wisner* v. *Nichols,* 1913, 165 Iowa 15, 143 N.W. 1020,

1024; 33 American Jurisprudence 220, 221, *Libel and Slander*, §162(b). See also, *Shiell* v. *Metropolis Co.*, 1931, 102 Fla. 794, 136 So. 537, 541.

Thus, the fact that petitioner alleged the article accused him of bigotry (and was published with actual malice—if such an allegation were otherwise sufficient) is not enough to state a cause of action when an examination of the article itself shows it does not.

The Sweeney Litigation

In 1939, a syndicated columnist wrote that Congressman Martin Sweeney opposed the appointment of one Emerich Burt Freid to the federal bench because Freid was a foreign-born Jew.

Sweeney claimed he had been libeled and embarked upon a course of litigation that for sheer perseverance is rivaled only by that of General Edwin A. Walker, the plaintiff in *Associated Press* v. *Walker*, 1967, 388 U.S. 130. Sweeney met with repeated failure as courts throughout the country dismissed virtually identical complaints, holding the alleged defamation was not libelous per se.[2]

Sweeney met with partial success only once. In *Sweeney* v. *Schenectady Union Pub. Co.*, 2d Cir. 1941, 122 F. 2d 288, the court in a two-to-one decision reversed a dismissal of the complaint, and on certiorari was affirmed by an equally divided Court, 316 U.S. 642.

---

2. *Sweeney* v. *Philadelphia Record Co.*, 3rd Cir. 1941, 126 F. 2d 53; *Sweeney* v. *Capital News Co.*, S.D. Idaho, 1941, 37 F. Supp. 355; *Sweeney* v. *Caller-Times Pub. Co.*, S.D. Texas, 1941, 41 F. Supp. 163; *Sweeney* v. *Newspaper Printing Corp.*, Tenn., 1941, 147 S.W. 2d 406; *Sweeney* v. *Beacon Journal Co.*, Ohio App., 1941, 35 N.E. 2d 471, appeal dismissed, Ohio, 1941, 34 N.E. 2d 764. According to the *Caller-Times Pub. Co.* case (41 F. Supp. p. 165), similar actions Sweeney filed in still other jurisdictions were also dismissed.

Thereafter, the Court of Appeals for the District of Columbia held that the same statement was not libelous per se in *Sweeney* v. *Patterson,* supra, distinguishing the *Schenectady Union Pub. Co.* case as turning on a particular question of New York law. This Court denied certiorari in 317 U.S. 678.

Twenty-two years later, this Court quoted at length and with approval from *Sweeney* v. *Patterson* in the *New York Times* opinion, 376 U.S. 254, 272 and impliedly rejected the *Schenectady Union Pub. Co.* case, 376 U.S. at p. 268.

We submit that the *Sweeney* cases, particularly *Sweeney* v. *Patterson,* as approved by this Court in *New York Times,* are controlling on the question petitioner raises here—whether falsely accusing a public official of bigotry—is libelous per se. Thus, even if petitioner's interpretation of the article he complains of is correct—and it is not—the article is not libelous per se.

Non-Federal Grounds Argument Without Merit

Petitioner argues (Pet. 8-11) that the District Court of Appeal decided the case on unsupportable non-federal grounds whereas the controlling law is that set forth in the decision of this Court in *New York Times.*

We submit petitioner misconstrues the decisions of the Florida courts. The trial court's Order stated:

(1) ". . . the publication does not fall within the definition of libel per se as defined by the courts of Florida," and

(2) "I further find that the article complained of concerned a public official, (the Plaintiff-Mayor) and the manner in which he presided over a meeting of his council and that the article represented the opinion of the author and constitutes privileged criticism or fair comment." (R. 511).

Thus, the trial court held in effect that the publication was not libelous per se either under Florida law or under the federal law dealing with the constitutional privilege applicable to public officials.

In affirming, the District Court of Appeal cited both *Adams* v. *News-Journal Corporation,* supra, and the *New York Times* decision, thereby also holding that the article was not libelous per se either under pre-*New York Times* Florida law or under the applicable federal decisions.

We have discussed above why the article is not libelous per se on the authority of *Sweeney* v. *Patterson,* supra, and the *New York Times* decision.

In *White* v. *Fletcher,* 1956, 90 So. 2d 129, the Supreme Court of Florida anticipated the decision of this Court in *New York Times.* There, the defendant stated the plaintiff was unfit to be a police officer. In affirming a summary judgment for defendant, the court said:

> "As expressed by Mr. Justice Terrell in Kennett v. Barber, 159 Fla. 81, 31 So. 2d 44, 46, this Court held:
>
> > 'We think the rule is now generally accepted that any one who seeks public employment or public office or who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that *they* may determine whether it squares with such a standard of integrity and correct morals as warrants their approval.' (Emphasis added).
>
> "The uniformed policeman, therefore, was certainly subject to fair comment and criticism from any member of the public of the City of Orlando. The generally accepted rule is that 'public officials' or 'public men' are subject to such fair comment."
>
> 90 So. 2d p. 131.

We submit it makes no sense to argue, as petitioner does, that the District Court of Appeal deliberately sidestepped a federal question when that court's opinion shows its decision is based on a decision of this Court and a decision of the Supreme Court of Florida.

Petitioner discusses the opinion of the Supreme Court of Florida in *Adams* v. *News-Journal Corporation,* supra, and attempts to distinguish it (Pet. 9). The article complained of there was about an attorney who was in the public eye; the comment and criticism of him was harsher than anything published about petitioner in the article he complains of.

We believe that decision is authority here for the proposition that, even before *New York Times,* statements such as those petitioner complains of were not libelous per se in Florida.

Clear and Present Danger Doctrine Inapplicable

Finding no support in recent decisions discussing defamation of public officials or public persons, petitioner seeks to engraft upon the constitutional privilege a combination of the "clear and present danger" doctrine and the proposition that the governed must not criticize their governors.

We do not believe any detailed discussion of the authorities petitioner cites as authority for the "clear and present danger" argument is necessary. It is sufficient to say that if the newspaper advertisement involved in the *New York Times* case was not a clear and present danger to the maintenance of law and order in Montgomery, Alabama, then criticism of petitioner's handling of a city council meeting is not likely to result in the overthrow of the government in North Miami Beach, Florida.

On his contention that harsh comment will drive educated men of refinement from public life, we refer petitioner to the *New York Times* opinion and particularly the statement:

> "If judges are to be treated as men of fortitude, able to thrive in a 'hardy climate,' Craig v. Harney, supra, 331 U.S. at 376, surely the same must be true of other government officials, such as elected city commissioners."
>
> 376 U.S. p. 273.

As to petitioner's argument that the article was a personal attack on a practicing attorney (Pet. 14), we refer him to *Sweeney* v. *Schenectady Union Pub. Co.*, supra, where the court said:

> "We are not concerned, however, with any libel on the plaintiff as a lawyer, since no reference was made in the publication to that profession of his."
>
> 122 F. 2d pp. 289-290,

and also to *Sweeney* v. *Philadelphia Record Co.*, supra, where the court said:

> "Indeed there is nothing in the published matter which connects the plaintiff in any way with the legal profession."
>
> 126 F. 2d p. 54,

and to *Garrison* v. *Louisiana*, 1964, 379 U.S. 64, 76-77, and to *Gilberg* v. *Goffi*, N.Y., 1964, 21 A.D. 2d 517, 251 N.Y.S. 2d 823.

POINT TWO

WHETHER OR NOT THE LOWER COURT COULD HAVE DISPOSED OF THE CASE BY GRANTING A SUMMARY JUDGMENT

Although he argues that the dismissal of the Complaint as amended was improper, petitioner goes beyond the Complaint itself and refers to other matters in the Record which were before the lower court when respondents' Motion for Summary Judgment was argued.

We have pointed out above how and why the lower court had pending before it at the same time the Motion to Dismiss and the Motion for Summary Judgment. When petitioner goes outside the Complaint, we do not mean in any way to criticize him for it.

But, at the same time, we feel obliged to discuss matters in the record other than the Complaint in order to respond further to petitioner's claim he was deprived of the right of jury trial.

Even if the article did libel petitioner—and we have argued above it did not—the record shows there was no actual malice. Thus, the trial court on the record before it could have reached the same ultimate result by granting respondents' Motion for Summary Judgment. There was nothing for a jury to pass on.

As the article shows, it dealt with petitioner's actions at a city council meeting when one Jack Becker accused Bill McDonald, an incumbent councilman and candidate for mayor, of anti-Semitism. This was the meeting of April 4, 1967 (R. 430).

At the council meeting the week before, the same Jack Becker, also a candidate for office, was recognized from the floor and accused a group known as the C.A.C. of Nazi

tactics (Defendants' Exhibit A for Identification, Deposition of Arthur I. Snyder, R. 426, 88).

(The C.A.C. was a group that was backing a slate of candidates for the North Miami Beach municipal elections (R. 433-434). McDonald was the candidate for mayor on the C.A.C. slate (R. 426); petitioner, the incumbent mayor, was not a candidate for re-election (R. 410) but had made known his opposition to McDonald's candidacy (R. 413).)

Almost immediately after Becker began at the March 28, 1967 meeting, petitioner cut him off, saying:

> "Mr. Becker, I don't want to go into those things. I don't want to get involved in any politics from this Council."
>
> (R. 88, 426).

At the April 4, 1967 council meeting, the same Jack Becker was again recognized from the floor, and the following occurred:

> "JACK BECKER: 'Gentlemen, a week ago tonight I came before this Council and I stated that there was an element calling themselves the C.A.C. which were using Nazi and Hitler techniques in securing votes. Tonight I'm going to show you what I got in the mail.'
>
> " 'This is a letter addressed to "Dear Blank: We would appreciate your help in getting people to support Bill. He is running against the worst element in the City and we hope and pray that the people will stand by him." Signed by Marge McDonald.'
>
> " 'I would like to know if this means that every Jew in this City is the worst element in the City.'
>
> "MAYOR SNYDER: 'Mr. Becker, we have never allowed any of that type of tactics to be used. I will not allow any of that type of representation to be used here.'

"COUNCILMAN McDONALD: 'I demand the right to answer this man.

"JACK BECKER: 'I haven't finished yet. You wait until I finish.' . . ."

(Defendants' Exhibit B for Identification to Deposition of Arthur I. Snyder, R. 428, 84).

Bill Robertson, the author of the article, testified that Snyder had cut Becker off at the March 28, 1967 council meeting as soon as Becker mentioned Nazi tactics (R. 185). He said Snyder did not attempt to cut Becker off at the April 4, 1967 meeting until after Becker had "spilled the guts" of his accusation (R. 186).

Based on Snyder's handling of Becker the week before, Robertson thought Snyder could (R. 188) and should have cut Becker off as soon as he used the words "Nazi and Hitler tactics" at the April 4th meeting (R. 189).

Robertson did not know whether Snyder knew in advance what Becker was about to say (R. 185-186). He thought Snyder must have had some indication of what Becker was going to talk about because Becker had used the same words—"Nazi and Hitler tactics"—at the earlier meeting (R. 186).

Harwell, the editor and publisher of the North Dade Journal, edited Robertson's article but did not change the substance of it (R. 330-331). As with other articles Robertson had written for the paper, Harwell assumed it was factually correct (R. 336). He relied on Robertson (R. 340).

Snyder agreed he had not attempted to cut Becker off until he mentioned the word "Jew" (R. 435). He said Becker said it awfully fast. He did not know in advance what Becker was going to say at the April 4, 1967 meeting.

If he had known, he thought he would have cut Becker off sooner (R. 443).

Thus, even if the article was libelous per se, we submit that the evidence before the lower court fell far short of proof of actual malice with the "convincing clarity" required by the *New York Times* and the "high degree of awareness of . . . probable falsity" of *Garrison* v. *Louisiana,* supra. It fell far short of showing that respondents had the "serious doubts as to the truth of . . . (the) publication" of *St. Amant* v. *Thompson,* 1968, 390 U.S. 727.

Readers of the North Dade Journal, the petitioner, or this Court may agree or disagree with those opinions and criticisms; that is not the point. The point is that Robertson wrote the article believing it to be true and the opinions he expressed were *not* "so inherently improbable that only a reckless man would have put them in circulation." *St. Amant* v. *Thompson,* supra.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SCOTT MCCARTHY STEEL HECTOR & DAVIS

By .....

WILLIAM C. STEEL
Attorneys for Respondents
14th Floor First National Bank Building
Miami, Florida 33131